

Service Date: December 17, 1992

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Application of)	TRANSPORTATION DIVISION
Bob J. Turney and Roger D. Peters,)	
a partnership dba Brokenass)	DOCKET NO. T-9929
Trucking for a Class B Montana)	
Intrastate Certificate of Public)	
Convenience and Necessity.)	ORDER NO. 6167

FINAL ORDER

APPEARANCES

FOR THE APPLICANT:

J. Blaine Anderson, Jr., 112 South Washington, Dillon, Montana 59427

FOR THE PROTESTANTS:

John Warren, P.O. Box 26, Dillon, Montana 59725-0028

FOR THE COMMISSION:

Dave Burchett, Transportation Division, 1701 Prospect Avenue, Helena, Montana 59620

BEFORE:

Timothy N. Sweeney, Staff Attorney and Hearing Examiner

BACKGROUND

On August 28, 1992 the Commission received an application from Bob Turney and Roger Peters, a partnership dba Brokenass Trucking (Applicant) for a Certificate of Public Convenience

and Necessity, Class B, authorizing the transportation of livestock between all points and places in the State of Montana.

The Commission received written protests from the following carriers: W.R. Cleverley and Verna S. Cleverley, PSC No. 3402; Jon C. Kantorowicz, PSC No. 8904; Mike Maloney and Monica Maloney, PSC No. 1437; William J. Kent, PSC No. 3415; and Ron Horn, PSC No. 3553.

Following issuance of proper notice, a hearing was held on November 12, 1992 in the Multipurpose Room, Beaverhead County Courthouse, #2 Pacific, Dillon, Montana. At the conclusion of the hearing the parties stipulated to a final order.

DISCUSSION

In considering applications for operating authority, the Commission is governed by the provisions of 69-12-323, MCA. Paragraph (2)(a) of that section provides as follows:

(2)(a) If after hearing upon application for a certificate, the commission finds from the evidence that public convenience and necessity require the authorization of the service proposed or any part thereof, as the commission shall determine, a certificate therefore shall be issued. In determining whether a certificate should be issued, the commission shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout 12 months of the year and the effect which the proposed transportation service may have up on other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby.

Applying this language to the facts presented by any application for additional transportation authority, the Commission has traditionally undertaken the following analysis: First, it asks whether the applicant has demonstrated that there is a public need for the proposed service. If the applicant has not demonstrated public need then the application is denied and there is no further inquiry.

Second, if the applicant has demonstrated a public need for the proposed service, then the Commission asks whether existing carriers can and will meet that need. If demonstrated public need can be met as well by existing carriers as by an applicant, then, as a general rule, an application for authority will be denied. Third, once it is clear that there is public need that cannot be met as well by existing carriers, the Commission asks whether a grant of additional authority will harm the operations of existing carriers contrary to the public interest. If the answer is yes, then the application for new authority will be denied. If the answer is no, then the application will be granted, assuming the Commission determines the applicant fit, willing and able to provide the proposed service.

The traditional analysis described above has perhaps been stated most concisely in the case of Pan American Bus Lines Operation, 1 M.C.C. 190, 203 (1936):

The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines of carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

Accordingly, the first question to be addressed is whether Applicant has demonstrated a public need for the proposed service. In this regard, Applicant presented a number of witnesses who testified as to a need for the proposed service. These witnesses included Representative Chuck Swysgood, Roger Peters, Ken Holland and Deborah Zohner. Both Swysgood and Holland are certificated carriers with authority to transport all livestock to all points and places in Montana. Their testimony indicated that the volume of livestock a shipper wants transported sometimes exceeds the capacity of their equipment and they sometimes need the assistance of other carriers. On this basis, they supported the application since another carrier would be available if it were granted.

Peters is an individual member of the partnership applying for authority. While he actively ships livestock, his opinion that the proposed service is needed must be disregarded as biased.

Zohner is the wife of the manager of the Bar Double T Ranch outside of Grant, Montana. Zohner testified that she actively participates in the management of the ranch. She also testified that Protestant W.R. Cleverly had been unable to provide service on one occasion.

On cross-examination of the supporting witnesses it was pointed out that since Applicant was currently leased out to Peters, a rancher, Applicant could satisfy the witnesses' need without authority. Indeed, pursuant to Section 69-12-405(2)(a), MCA, a Class B authority is not required for the transportation of livestock by a motor carrier when it is performed by a bona fide farmer, rancher or raiser of livestock in his own vehicles. In this case, by leasing out to someone who qualifies under the 69-12-405(2)(a) exemption, Applicant is already legally able to provide the service that the witnesses are supporting. However, an applicant's ability to provide service under a lease arrangement cannot mitigate against shipper need for additional service. If it did, no new additional authority would ever issue since it could always be argued that the applicant could lease on to a carrier with existing authority. Further, neither the shipping public, the lessee nor the Commission has any assurance that the lease will continue to be in effect.

The Commission is inclined to agree with Swysgood's statement that livestock authority is a different breed of cat when trying to determine need. Existing carriers and those covered by an exemption usually oppose rather than support an application for additional authority. However, as the presence of Swysgood, Holland and Zohner would indicate, this is not necessarily the case when it comes to livestock authority. The livestock shipping business is such that the existing carriers and exempt farmers, ranchers and raisers of livestock often rely on other carriers and farmers, ranchers and raisers of livestock to assist with hauls. Livestock shipping is also unusual in that by the very nature of their business most livestock shippers are covered by the 69-12-405(2)(a) exemption -- this same section also exempts the transportation of livestock by a bona fide farmer, rancher or raiser of livestock for another farmer, rancher or raiser of livestock as between farm and farm, ranch and ranch, or pasture and pasture

or to a point. A logical conclusion might be that there would be little need for authority since most everyone who has a need to ship livestock, i.e., a farmer, rancher or raiser of livestock, is already exempt or can be served by another farmer, rancher or raiser of livestock. However, the testimony of Swysgood and Holland tells that there is not only a need for Applicant's services, but also for another carrier who meets the insurance and financial standards imposed on certificated carriers. Therefore, based on their testimony, the Commission concludes that there is indeed a need for the proposed service.

The second question to be answered then is whether the needs of the shipping public can be sufficiently served by the existing carriers. Both Swysgood and Holland testified that there were a shortage of carriers at peak periods and they would welcome an additional certificated carrier to assist them with moving loads they cannot individually handle. Swysgood further testified that he could not handle all the business that came his way. Additionally, the testimony of most of the witnesses, including the protestants, indicated that bringing in another carrier to assist with hauls is a routine and current practice. Even Applicant Turney testified that in the month preceding the hearing he himself needed to bring in other carriers on 6 of 18 moves. While the two protestants testified that they would be available to assist with hauls, there was not sufficient evidence to conclude that they could meet the entire need themselves. The Commission therefore finds that the existing carriers are unable to sufficiently meet the needs of the shipping public.

The next question for the Commission to address is whether a grant of additional authority will harm the operations of the existing carriers contrary to the public interest. Protestants Cleverly and Maloney both testified that their respective revenues have declined because of competition. In this regard, Cleverly testified that there are 21 certificated carriers within a 50 mile radius of Dillon and at least another 15 carriers operating under the 69-12-405(2)(a) exemption. Both carriers testified that Applicant would be just one more carrier in an already saturated market. Of course, the grant of an additional authority generally will impact an existing carrier's business. However, there will be no

discernible increase in competition in this case since Applicant is already legally operating in the market under a lease arrangement. Also, the fact that two of the existing carriers appeared to support the application argues against any finding of harm. Therefore, the Commission finds that a grant of additional authority will not harm the operations of the existing carriers contrary to the public interest.

On this point, the protestants did stress during their respective testimony that a grant of additional authority would decrease the value of their authority should they try to sell it. The Commission does not doubt that the fewer authorities that are issued the more valuable they are when a carrier tries to sell one. However, the public interest has never been measured against an authority's resale value and the Commission will not concern itself with protecting the investment value of an authority.

Therefore, based on the foregoing, the application of Brokenass Trucking is hereby granted.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission has jurisdiction over the parties and subject matter addressed in this proceeding. Section 69-12-201, MCA.
2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter as required by Section 69-12-321 and 69-12-322, MCA.
3. The Commission has the authority to grant a certificate of operating authority if required by public convenience and necessity. Section 69-12-323.

ORDER

NOW THEREFORE IT IS ORDERED that the application from Bob Turney and Roger Peters, a partnership dba Brokenass Trucking (Applicant) for a Class B, Montana Intrastate Certificate of Public Convenience and Necessity is hereby granted, authorizing the transportation of livestock between all points and places in the State of Montana.

IT IS FURTHER ORDERED that all objections and motions made during the hearing in this Docket that were not ruled on are denied.

Done and Dated this 17th day of December, 1992 by a vote of 4-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DANNY OBERG, Chairman

WALLACE W. "WALLY" MERCER, Vice Chairman

BOB ANDERSON, Commissioner

TED C. MACY, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.